



United States
Department of
Agriculture

Forest
Service

Kootenai National
Forest

31374 US Highway 2
Libby, MT 59923

EXHIBIT 19
DATE 3-17-11
SB 117

File Code: 1900
Date: March 25, 2009

Mr. Steve Curtiss
Chairman
Glen Lake Irrigation District
P.O. Box 297
Eureka, MT 59917

Dear Mr. Curtiss:

On January 29, 2009, District Ranger Betty Holder received a copy of the Glen Lake Irrigation District ("GLID") Natural Resource Plan ("Plan"). In a February 12, 2009 letter, I told you of my concerns about the GLID Plan, and said that I was contacting the U.S.D.A Office of the General Counsel (OGC) for their opinion and advice. I have received an opinion from OGC, and this letter incorporates their review and advice, specifically on the GLID Plan. This letter also describes Forest Service responsibilities to solicit and consider the views of GLID or any local governmental agency.

Based on our review of the Plan, we conclude: (1) the Plan exceeds GLID's authority under State law; and (2) even if the Plan was within GLID's authority under State law, it is pre-empted by federal law. The Forest Service is constrained by neither the substantive nor the procedural provisions of the GLID plan. The Forest Service does have responsibility to solicit and consider input from local governmental entities with respect to its land management decisions; however, GLID may not dictate how those responsibilities are fulfilled.

A. The Plan Exceeds GLID's Authority Under State Law

The Plan adopted by GLID relates solely to management on federal and state lands. None of the provisions relate to management on lands either owned or managed by GLID or private individuals. The Plan states:

GLID is a public corporation with local government authority as to land use, water and resource management and environmental planning processes within the boundaries of the GLID. The State of Montana has enacted statutes which authorize GLID to develop processes for determining land use, resource and water management, and environmental planning, and statutes which authorize the GLID to implement those governmental processes. Plan p. 9.

The Plan next states that:

The National Forest Management Act requires the United States Forest Service to coordinate its planning process and its management actions in implementation of its plan, with GLID, as



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an established unit of local government in order to attain and maintain consistency between the federal and local plans and actions. *Id.* p. 9.

GLID claims that the Forest Service has an "obligation to attain and maintain consistency" with the Plan. *Id.* p. 10.

The vast majority of the GLID Plan consists of directives aimed at Federal and State land managers and purports to describe management directives with which the GLID alleges the Forest Service (and other state and Federal land managers) must be consistent.

The Plan first attempts to impose a procedural obligation on Federal, State, and County agencies "that have the potential to impact, GLID, GLID membership, the local community, local tax base, its citizens and their private property rights, and custom and culture, and resources" to "prepare and submit in writing, in a timely manner, report(s) on the purposes, objectives and estimated impacts of such actions, including economic to the Board of Glen Lake Irrigation District". *Id.* p. 13

The Plan contains extensive provisions that attempt to dictate how lands and resources under the jurisdiction of the Forest Service are to be managed and asserts that "Federal and state agencies, and County, shall coordinate their plans and activities with the Board by integrating the applicable findings, goals, objectives, and policies of this Plan into their Planning documents and activities." *Id.* p. 22.

The Plan contains numerous attempts to impose substantive and procedural requirements on the Forest Service including:

- No loss of private property, use, rights or vested interests will occur due to natural resource land use or environmental issues and planning process related to these issues. p. 23.
- Social science shall have no weight in environmental, natural resource and land use issues. (Excluding, however, GLID's recitation of "culture and custom" from the definition of social sciences). p. 24
- No net loss of private property ownership. p. 25
- Protect local culture and custom. *Id.*
- Land tenure adjustments for any government agency should provide for no net loss of private land. p.29.
- No federal authority shall acquire any private lands or rights within Lincoln County. *Id.*
- Federal and state lands that are difficult to manage or which lie in isolated tracts should be considered for exchange or sale. p.30.
- No permits or fees shall be required for "recreational" placer mining with the use of dredges 4 inches or less. p. 31
- Increase acres and Animal Unit Months (AUM) available for grazing allotments. p.32.
- No "let burn" policy for fires within GLID watershed or adjoining watersheds. All non-scheduled fires will be actively fought until extinguished. p. 36
- The U.S. Forest Service will establish internal procedures to define and designate a wildfire incident for active suppression or designate it as a wildfire use event within 15 minutes from first contact with incident command. p. 41

- If a decision on the fire cannot be made within 15 minutes the Forest Service must actively suppress the fire until extinguished. *Id.*
- Wildfires shall be actively fought to extinction. Fire engagement shall be conducted aggressively 24 hours a day. *Id.*
- English is the official language of Lincoln County. *Id.*
- No non-English speaking or reading personnel shall be allowed on fire incidents within Lincoln County. *Id.*
- Roads within Federal managed lands shall be maintained for emergency vehicles to provide initial assault and support. *Id.*
- Road obliterations shall not occur on federal lands without coordination with the Board. Road obliterations accomplished prior to the date of the Plan shall be reviewed to determine whether the road should be re-opened. *Id.* p. 32.
- Burned areas larger than one acre accessible to log hauling trucks shall be salvage logged. *Id.* p. 43
- Aggressive thinning of all federal lands within the GLID shall be initiated.
- Whenever possible at least 50% of initial responding fire fighting personnel shall be citizens of Lincoln County. *Id.* p. 44.
- Federal land managers shall not use road closures as a management tool to eradicate, slow the progress, or prevent new infestations of noxious weeds. *Id.* p. 47.
- Salvage sales shall be expedited. *Id.* p. 50
- No upper limit on allowable sale quantity but there is a minimum allowable sale quantity of timber. *Id.*
- Salvage shall be commenced within 30 days of the event. *Id.*
- No more than 20% of timber sales within a 5 year running average will be "Stewardship Contracts". *Id.* p. 51.
- Large fuel loads shall be reduced to a low intensity levels by logging and thinning. *Id.* p.55
- Use of fire retardant, when applicable, to suppress fires is encouraged, without liability. *Id.*
- Watershed landscapes will be treated by thinning trees and shrubs to produce low intensity fires. *Id.* p. 56.
- Economic impact of proposed actions to reintroduce wildlife shall be provided by independent sources outside the agency that is requesting such action. *Id.* p. 66
- Any predator that, by its actions, creates the perception to any citizen of a threat to life, injury, or property loss may be killed. In all cases, only the citizen in this situation can determine the appropriate action needed. An investigation into the killing of a predator on the threatened and endangered species list can only occur if three citizens witness the "wanton take" of the predator. *Id.* p. 67.
- Hatchery fish shall be deemed native and shall be considered "genetically identical" to native populations. *Id.* p. 69.
- Campgrounds must remain open and ungated all year long. *Id.* p. 71.
- The Forest Service should provide low level improvements such as trailhead parking, outhouses, stock ramps, boat launch sites and trash containers free of charge. *Id.* p. 71.
- 95% of system routes should remain open for public motorized access and use. *Id.* p. 72.
- No more than 25% of non wilderness areas should be restricted from snowmobiling. *Id.* p. 72.
- The Forest Service "must maintain all existing routes, uses, buildings and roads present" in Inventoried Roadless Areas recommended for Wilderness. *Id.* p. 77
- In areas other than Wilderness all government agencies shall "establish, open and maintain all

routes, rights-of-way, buildings and uses that were present in all areas prior to the agency's proposal for designation as roadless, semi-primitive, RNA's and/or wilderness areas." *Id.* p. 78

- There shall be no designation of Biological Connecting Corridors and/or buffer Area designations in the County adjacent to Wilderness areas unless so designated in both or either instances by congressional authority. *Id.* p. 79.
- All roads, rights-of-way, buildings and uses that were present within areas proposed but not designated as Wild and Scenic Rivers must be reestablished, opened and maintained. *Id.*
- Agencies involved with ESA listings "shall acknowledge that extinct is a natural process" and shall have a classification to acknowledge this fact, such as 'Not recommended for listing – natural selection in progress'. *Id.* p. 81.
- The ESA shall never be applied to "climate change issues". *Id.*
- The Forest Service must provide access to and use of all routes on federal lands "existing and previously existing" which were on the agency's route system at the time the 1986-87 Forest Plan was adopted." *Id.* p. 83
- Lack of funds shall not be a reason for closing a road. *Id.* p. 84.
- All routes are open to OHV and 4-wheeled vehicle use, unless signed on the ground and shown on travel plan maps as closed. *Id.* p. 86
- Federal law enforcement officers have only the authority in Lincoln County which the Sheriff allow them. *Id.* p. 87.

The laws of Montana relating to the organization, administration, and operation of irrigation districts are found in Chapter 85 of the Montana Code. Significantly, none of these laws provide authority for irrigation districts to regulate land uses on either private, state or federal lands within the irrigation district. While Mont. Code Ann. Title 85, chapter 7 authorizes the creation of irrigation districts as a public corporation, the powers delegated to irrigation districts are limited to those found within chapter 7 of Title 85. Mont. Code Ann. § 85-7-1902 (2007). Irrigation districts have limited jurisdiction over the lands brought into the district. They may issue bonds; contract with the Federal government to acquire, maintain, or build waterworks; and protect its water rights in accordance with Montana law. However, the Plan goes far beyond the scope of these powers to attempt to dictate performance of federal government functions such as law enforcement, fire suppression, forest management, wildlife, recreation, and others. We are aware of no Montana laws which delegate either general land use authority or environmental planning authority generally to irrigation districts. GLID cites no authority for their statements that they possess such authority.

It is our position that GLID's attempt to regulate and control land uses on the national forests exceeds the authority of an irrigation district under Montana law. GLID is granted no general land use regulatory authority under state law and no environmental regulatory authority under state law. Accordingly GLID's attempt to adopt a Plan that dictates federal land management practices exceeds its delegated authority.

B. Even If the Plan Was Within GLID's Authority, It Is Pre-Empted By Federal Law

The Constitution of the United States provides that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United

States” U.S. Const. Article IV. The U.S. Supreme Court has made it explicitly clear that “while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that the power over the public lands thus entrusted to Congress is without limitations.” *Kleppe v. New Mexico* 426 U.S. 529, 536-37 (1976). Congress retains the power under the Property Clause to enact laws regarding federal lands and when it does, such laws necessarily override conflicting state laws under the Supremacy Clause. When state laws conflict with federal law, federal law must prevail: “A different rule would place the public domain of the United States completely at the mercy of state legislation.” *Kleppe*, 426 U.S. at 543 citing *Camfield v. United States*, 167 U.S. 518, 526 (1897).

As the Supreme Court has repeatedly held, the United States is wholly immune from local control unless Congress has expressly granted permission. *Mayo v. United States*, 319 U.S. 441, 448 (1943). In holding that a State could not tax the United States, the Supreme Court in *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819) stated:

The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

The Supreme Court reaffirmed this principle just prior to its decision in *Kleppe*, when the Court held that the State of Kentucky could not require federal installations to obtain state air permits even though the Clean Air Act arguably directed coordination between the states and the EPA. Congress had exclusive legislative authority over federal property through the Supremacy Clause so “that the activities of the Federal Government are free from regulation by any state.” *Hancock v. Train*, 426 U.S. 167, 178 (1975).

State law may be pre-empted in either of two ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still-preempted to the extent it actually conflicts with federal law or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Silkwood v. ker-McGee Corp.* 464 U.S. 238, 248 (1984).

In *California Coastal Commission v. Granite Rock Co.* 480 U.S. 572 (1987) the Supreme Court allowed a narrow area in which states are allowed to impose some control in federal lands matters. In a 5-4 decision, the Court held that the California Coastal Commission’s requirement that a mining company obtain a state permit to work its unpatented mining claims located in a national forest was not pre-empted because it was an environmental regulation, not a land use regulation. *Id.* at 587. “Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that however the land is used, damage to the environment is kept within prescribed limits.” *Id.* The Court held that the permit requirement sought by the California Coastal Commission was an environmental regulation; otherwise it would have been invalid. “Federal lands use statutes and regulations, while arguably expressing an intent to pre-empt state land use planning, distinguish environmental regulation from land use planning.” *Id.* at 593.

There is no question that GLID's proposed plan is an attempt to impose land use planning on the Forest Service. Indeed, the plan expressly states as much. Under the reasoning of *Granite Rock*, GLID's attempt to impose land use regulation on the federal lands is pre-empted by federal law.

The legal principles outlined above are well established and not seriously subject to dispute. The attorneys general of New Mexico, Montana, Nevada, Oregon, and Washington have all advised that counties cannot dictate federal land management policies contrary to federal law. Most relevant to the present situation is the letter of advice issued by Montana Attorney General Joe Mazurek.¹ Attorney General Mazurek advised that "[s]tate legislation cannot prevail on federal public lands when it conflicts with federal legislation, and likewise a county ordinance or land use plan applicable to federal public lands will not be allowed to stand when it conflicts with federal law." Attorney General Mazurek discussed federal statutes requiring coordination of planning efforts with local governments but significantly, and correctly, concluded "...these coordination provisions do not *require* federal officials to follow local government plans or ordinances."

In *Boundary Backpackers v. Boundary County* 913 P.2d 1141 (Idaho, 1996) the Idaho Supreme Court struck down a county ordinance very similar to GLID's proposed Plan which attempted to exercise county control over federal land management decisions. The court held that the ordinances purporting to limit the federal government's control over federal public lands were preempted by federal laws, including laws authorizing federal acquisition of land, laws authorizing federal withdrawals of land, and laws requiring the protection of endangered species, wild and scenic rivers, and wilderness areas. The court found these provisions to be unconstitutional under the Supremacy clause, found that the offending provisions were not severable from the remainder of the county plan, and thus struck down the ordinance in its entirety. *Id.* at 1148.

Based on the foregoing, even if the GLID's proposed Natural Resource Plan was a proper exercise of delegated authority, it is preempted by federal law.

C. Forest Service "Coordination" Responsibilities

The Forest and Rangeland Renewable Resources Planning Act (16 U.S.C. § 1604(a)) states that the Secretary of Agriculture shall "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest system, coordinated with the land and resource management planning process of State and local governments and other Federal agencies." Similarly, Forest Service regulations implementing this statutory provision provide that "the responsible official must provide opportunities for the coordination of Forest Service planning efforts undertaken in accord with this subpart with those of other resource management agencies. The responsible official also must meet with and provide early opportunities for other government agencies to be involved, to collaborate, and to participate in planning for NFS lands." 36 C.F.R. § 219.9(a)(2).

Contrary to GLID's assertion, neither the statutes governing Forest Service planning nor the regulations implementing these statutes provide more than an advisory role for local governments. Senator Hubert H. Humphrey, the primary sponsor of the RPA legislation, stated that the Secretary's

¹ A copy of this letter is attached. Attorney General Mazurek issued a "letter of advice" rather than a formal opinion because "the issues presented are straightforward and can be resolved by reference to readily available authority."

duty is "to consult and give careful consideration to the impact of these... plans on ... local jurisdictions." 120 Cong. Rec. 26555 (1974). In *Calif. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 585 (1987) the Solicitor General interpreted the coordination obligations as giving local governments merely "an advisory role in federal land management decisions."

The Forest Service planning regulations require it to use a "collaborative and participatory approach to land management planning." The Forest Service must engage interested individuals and organizations, State and local governments, federal agencies, and Indian tribes. 36 C.F.R. § 219.9. The input received from these varied sources will often suggest contradictory management approaches. The Forest Service must consider the competing interests based on the unique circumstances applicable to the planning effort and cannot mandate that a particular party's interests trump all others. Contrary to GLID's assertion, county or local interests, while important, are not given preference over the general public or other interests in regards to federal land use planning.

In addition to the forest planning processes discussed above, local governments can participate in the development of projects through the NEPA process. Where the state or local government has established environmental assessment requirements "comparable" to NEPA, the Forest Service must cooperate with the State and local agencies to the fullest extent possible to reduce duplication between state and local requirements. 40 C.F.R. § 1506.2. Such cooperation may include joint planning processes, joint environmental research and studies, joint public hearings and joint environmental assessments. *Id.* The Forest Service routinely enters into joint planning processes with the State of Montana in situations such as mining proposals in order to fulfill the requirements of both MEPA (Montana Environmental Policy Act) and NEPA. In these situations both the State and the Forest Service have regulatory authority over the proposed activity. In contrast to this situation however, GLID has established neither that it possesses regulatory authority over any described class of actions nor that it has established procedures "comparable" to NEPA for approval of such proposed actions.

Nevertheless, GLID has full opportunity to participate in Forest Service decision-making through the NEPA process. Given your expressed interest, we will insure that you are notified of proposed projects and provided meaningful opportunity to make your views known. The Forest Service will review and consider constructive comments and suggestions made by GLID during the NEPA process. The Forest Service has frequently entered into Memoranda of Understanding (MOU's) with counties which spell out a process for county participation in such planning efforts. GLID may not, however, dictate to the Forest Service either the form or substance of its participation.

Ultimately, both NEPA and RPA/NFMA and their implementing regulations establish the same proposition, that local governments serve only an advisory function in federal land management. Congress has not extended to local governments the power and authority clearly reserved by the Property Clause of the United States Constitution. The Forest Service retains absolute discretion and authority to make forest planning and use decisions. Nevertheless both RPA/NFMA and NEPA recognize the distinct and influential perspective that local governments may present to federal decision-makers. County and local governments provide a distinct and vital perspective that is not diminished by the fact that their views are advisory rather than obligatory. It is the Forest Service policy to facilitate and encourage the full involvement of county and local governments in order that their views may be appropriately considered in Forest Service decisions.

We look forward to working with you on forest and project planning within the parameters presented above. If you wish to discuss the opinions or contents of this letter, please contact Fortine District Ranger Betty Holder at 406-882-4451 or Janette Turk of the Kootenai Forest Supervisor's office at 406-283-7764 to arrange a meeting.

Sincerely,

/s/ Paul Bradford

PAUL BRADFORD
Forest Supervisor

/s/ Alan Campbell

ALAN CAMPBELL
U.S.D.A. Office of the General Counsel
Missoula, Montana

Cc: Fortine District Ranger

Attachment